

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ALON P. ZIMMERMAN

Claimant

VS.

TOM'S MACHINE-WELDING SRV. INC.

Respondent

AND

WESTPORT INSURANCE CO.

Insurance Carrier

Docket No. 1,021,765

ORDER

Claimant requests review of the May 16, 2005 preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore.

ISSUES

The Administrative Law Judge (ALJ) found the claimant had failed to sustain his burden of proof that he provided timely notice of accident and therefore denied the requested benefits.

The claimant requests review of whether timely notice was given pursuant to K.S.A. 44-520. Claimant argues that he provided notice of his accident to his supervisor on the day of the accident and to the respondent's owner the next day. In the alternative, claimant argues that he suffered additional injury and/or aggravation to his lower back through the last day worked on January 24, 2005, and that respondent admits notice was provided February 3, 2005. Consequently, claimant requests the Board to reverse the ALJ's finding he failed to provide timely notice of accident.

Respondent notes that claimant's supervisor as well as respondent's owner deny claimant told them he suffered an accident at work. And claimant initially said he had not suffered additional back problems as he continued working after the alleged accident. Accordingly, respondent argues claimant never provided notice of the accident and further never suffered additional injury as he continued working after the alleged accident. Respondent requests the Board to affirm the ALJ's Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant alleged that on January 12, 2005, he injured his back while lifting a heavy component of an oil well pump in order to remove a bearing. Claimant testified he told his supervisor, Jimmy Jones, about the accident. Claimant further testified that the next day he told respondent's owner, Tom Noon, about the accident. Both Mr. Jones and Mr. Noon deny such conversations occurred.

Claimant continued working until he sought medical treatment for his back on January 24, 2005. Mr. Noon testified that he observed claimant having difficulty walking at the start of the workday and asked him what he had done. Mr. Noon further testified claimant said he had recurrent back problems since a motorcycle accident that had occurred when he was 12. Mr. Noon then suggested claimant try chiropractic treatment. Claimant sought chiropractic treatment with Dr. Eugene M. Davidson and provided a history of a motorcycle accident that had occurred 16 years ago but noted that heavy lifting makes his condition worse.¹

The ALJ analyzed the evidence in the following manner:

THE COURT: Thank you. This is a fun one. I agree that Mr. Zimmerman's description of an accident on or about January 12th is uncontroverted, and therefore, an accident could well be established by the evidence. Certainly, the evidence is clear that the nature of the work performed for this employer is heavy, that claimant was involved in the heavy-type of lifting that he attributes his injuries to, and the facts are generally supportive of a herniated disc arising in the time frame and in the manner in which claimant describes. Clearly, claimant has some findings on examination that are suggestive of a herniated disc. That he could not have been performing these kinds of work activities for a lengthy period of time with a herniated disc without disabling symptoms, so it appears as though claimant did suffer an injury in or about the time frame that he has alleged.

On the other side of the ledger, claimant has alleged a specific incident. He's testified that he gave immediate notice of that injury to Jim Jones and notice of that injury to Tom Noon the next day. Both of those individuals have testified here today, and both are quite clear and emphatic that they don't recall any such conversation, and they would recall if there had been any report of injury.

I note when claimant gave his recorded statement, he denied any prior back problems, even as he was telling the chiropractors that he had a motorcycle injury 16 or 17 years ago that had continued to cause him difficulties.

¹ P.H. Trans., Cl. Ex. 1.

I note that the intake records for the chiropractor, when claimant started seeking treatment this time around, are silent on causation. There's no reference to a specific incident at work, no description of this as a work related injury, merely a comment that heavy lifting aggravates the problem.

In the final analysis, this could well be a viable workers' compensation claim, but there are a couple of hitches here that preclude me from granting the relief that the claimant requests.

First, claimant in his deposition didn't testify to any continuing aggravation, and second, if he didn't give notice until February 3rd, that's outside the 10 days. He didn't allege initially that the time for giving notice was extended because of his lack of appreciation of his injury, he said he gave notice. We can't have both an immediate report of an accident and a fall back. Even if we didn't, we gave notice in sufficient time because we gave it within 10 days after we realized how severe it was, because those statements are internally inconsistent.

I'm in a quandary here, because I believe Mr. Zimmerman probably did hurt his back at work, although I do hear from Mr. Noon, that Mr Zimmerman could have been hustling scrap iron on the weekend, and that could be the problem, but I don't have any evidence of that fact.

I have an incident on January 12th that caused a pop as claimant described it in his deposition, but no immediate pain, and then pain progressing thereafter, but certainly, it was sufficient to cause Mr. Zimmerman to at least say that he gave immediate notice to Mr. Jones and notice the next day to Mr. Noon, and I cannot reconcile those two inconsistent statements. Either it was a significant incident that he recognized and he gave notice, which is disputed, or it was an insignificant incident that only became significant over time, in which case, it would be a timely notice, but that's not what claimant says happened. Claimant says he had an incident on January 12th, he didn't report it until February 3rd. He's failed to demonstrate good cause.

On that basis, I must at this time deny claimant's application for preliminary hearing benefits. There's nothing else, we'll be in recess.²

The claimant is required to provide notice of a work-related accident to the respondent within 10 days or show just cause to extend the notice requirement to 75 days.³ As noted, in this case there is a major conflict between claimant's preliminary hearing testimony and the testimony of respondent's witnesses. Thus, the credibility of claimant is of utmost importance in deciding this case.

² *Id.* at 97-100.

³ *See* K.S.A. 44-520.

The Board finds the ALJ, in specifically finding claimant did not provide timely notice, had to conclude that claimant's testimony was not truthful. The ALJ had the opportunity to evaluate both claimant and the respondent's witnesses because they testified in person at the preliminary hearing. In circumstances such as this, where there is conflicting evidence, the Board finds it is appropriate to give some deference to the ALJ's conclusions. The Board also finds that claimant's testimony is inconsistent and his testimony was contradicted by the testimony of respondent's witnesses. The Board, therefore, concludes claimant failed to prove he provided respondent with timely notice of the accident.

Because of the inconsistencies involving the statements made by claimant at different times, the Board is unable to find reliable evidence upon which to base a finding of just cause to extend the period of giving notice of accidental injury as provided by K.S.A. 44-520.

WHEREFORE, it is the finding of the Board that the Order of Administrative Law Judge Bruce E. Moore dated May 16, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August 2005.

BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant
David P. Mosh, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director